



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 10

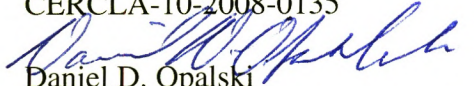
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OFFICE OF
ENVIRONMENTAL CLEANUP

August 5, 2009

MEMORANDUM

SUBJECT: Dispute Resolution Decision In the Matter of: Avery Landing Site, Avery, Idaho, Administrative Settlement Agreement and Order on Consent Docket No. CERCLA-10-2008-0135

FROM: 
Daniel D. Opalski
Director, Office of Environmental Cleanup

TO: File

This memorandum presents my decision in the above-referenced dispute. Attached is a summary of the Administrative Record upon which this decision is based.

Summary of the Dispute

Pursuant to the Administrative Settlement Agreement and Order on Consent (ASAOC) entered into between the Environmental Protection Agency (EPA) and Potlatch Forest Products Corporation (Potlatch) for the Avery Landing site, Potlatch submitted certain deliverables, namely a Draft Treatability Study Work Plan, Draft Field Sampling Plan, and Draft Quality Assurance Project Plan. In commenting on these deliverables, the EPA On-Scene Coordinator (OSC) directed Potlatch to make modifications to these documents. By letter dated June 17, 2009, Potlatch has disputed the OSC's directions (1) to expand the list of analytes for samples to be collected at the site and (2) to provide for Contract Laboratory Program (CLP) equivalent data packages.

Discussion

Pursuant to Paragraph 19 of the ASAOC, Potlatch is obliged to conform its sampling and analyses to EPA's direction, approval, and guidance. More broadly, the OSC, as EPA's designated representative for the site, has the authority under Paragraph 74 to direct modifications to any plan. There is apparently no dispute among the parties regarding either this fundamental obligation on behalf of Potlatch or the pertinent authority of EPA. Therefore, as a strictly legal matter, no further deliberation would be necessary.

The ASAOC does not prescribe limits on what can or shall be reviewed nor does it provide a standard of review as direction or guidance to the decision-maker in the dispute resolution process. Therefore, although I am not bound to do so, I nonetheless believe it is appropriate for me to consider the nature of the OSC's direction and the context in which it was provided.

As referenced on numerous occasions in the approved Engineering Evaluation/Cost Analysis (EE/CA) Work Plan, both parties recognize that the western portion of the site has not yet been characterized. To fill this gap in site information, the OSC has directed sample analyses consistent with those required for the initial characterization of the eastern portion of the site conducted by EPA. On this basis alone, the OSC's direction seems well within the realm of what Potlatch could have, and arguably should have, reasonably expected. Also, although Potlatch reports no knowledge of releases of hazardous substance since it assumed ownership of the property, use of the western portion of the site has been mixed and access is characterized as unrestricted, suggesting a broader list of analytes could be appropriate in an initial data collection effort.

That said, in its invocation of dispute and supplemental documentation, Potlatch contends that the OSC's directed modification would "require additional sampling and analysis beyond what EPA had previously determined was appropriate for the Site investigation." To support its contention, Potlatch refers to the list of Constituents of Potential Concern (COPCs) identified in the EE/CA Work Plan, suggesting that the identification of these COPCs amounts to a determination of the appropriate analytes for samples that are to be collected at the Site. Potlatch's position is supported by the fact that in several locations the EE/CA Work Plan does refer to samples being analyzed for (or not analyzed for) COPCs. However, I do not find the EE/CA Work Plan language unambiguously limiting in this regard, especially given the broadly stated objectives of understanding site risks and evaluating the effectiveness and implementability of potential removal actions. The deliverables currently in dispute apparently have provided the venue for the first explicit exchange on the breadth of analytes. Although the parties appear to have relied upon different assumptions and greater clarity between the parties would have been desirable, the record does not support a contention that the EE/CA Work Plan list of COPCs represents an agreed all-inclusive list of appropriate analytes.

As to the data quality assurance documentation requirements, Potlatch is correct in asserting that the requirements directed by the OSCs are not uniformly applied across all Superfund investigations. At the same time, this level of requirements is not unusual, and given the record that has been available for review by Potlatch and its consultants regarding previous characterization work at the Site -- including the data quality documentation for that work -- the expectation of this level of data quality documentation by the OSC should not be surprising. There was nothing provided for my review that reflects discussions that would lead to a different expectation.

Potlatch understandably cites concerns about the larger costs associated with the longer analyte list¹ and the data quality documentation requirements. EPA wholeheartedly shares Potlatch's interest in a cost-efficient approach to the site. However, the cost increase identified by Potlatch is relative to an estimate based upon assumptions it evidently did not confirm with the OSC regarding the breadth of the effort that would be needed to meet the EE/CA's

¹ I note that Potlatch's estimate of increased costs may be somewhat in error if it based such estimate on the Tables provided to me. No fewer than fourteen PAHs are listed twice, once as "non-disputed" analytes, and once included as "new" analytes under the longer list of SVOCs. Potlatch also omits seven priority pollutant metals that it had originally indicated were part of its proposed analyte list.

objectives. I note that even with the estimated cost increase, the delta that Potlatch identifies is, on a percentage basis, in the range of contingencies customarily built into these kinds of projects.

Decision

The OSC had the authority to direct modifications to the draft plans submitted by Potlatch. Although the ASAOC does not specify the standard to be applied in this dispute, I find the OSC's directed modifications to be reasonable given the circumstances at the site. Therefore, Potlatch is hereby instructed to make the modifications directed by the OSC.

Attachment

Dispute Resolution Decision In the Matter of: Avery Landing Site, Avery, Idaho, Administrative Settlement Agreement and Order on Consent Docket No. CERCLA-10-2008-0135

Administrative Record Summary

1. *Administrative Settlement Agreement and Order on Consent, USEPA Region 10 CERCLA Docket No. CERCLA-10-2008-0135*
2. *Final Engineering Evaluation/Cost Analysis Work Plan for the Avery Landing Site, Avery, Idaho, Golder Associates Inc., January 23, 2009*
3. Letter from Kevin J. Beaton to Daniel D. Opalski, *Re: In the Matter of Avery Landing Site, Administrative Settlement Agreement and Order on Consent (CERCLA Docket No. 10-2008-0135)*, June 17, 2009
4. *Support Plans for the Engineering Evaluation/Cost Analysis for the Avery Landing Site, Avery, Idaho; Golder Associates Inc., June 23, 2009*
5. Letter from Richard D. Mednick to Daniel D. Opalski, *Re: Dispute Resolution in the Matter of: Avery Landing Site, Avery Idaho*, July 6, 2009
6. Email from Dan Opalski to kjbeaton@stoel.com and Richard Mednick, *Subject: Avery Landing Dispute Resolution*, July 14, 2009
7. Letter from Kevin J. Beaton to Daniel D. Opalski, *Re: In the Matter of Avery Landing Site, Administrative Settlement Agreement and Order on Consent (CERCLA Docket No. 10-2008-0135)*, July 20, 2009
8. *Avery Landing Superfund Site Dispute Resolution – Supplemental Briefing Paper, July 21, 2009*, Prepared by Earl Liverman and Richard Mednick
9. Email from Earl Liverman to Dan Opalski, *Subject: Avery Landing*, July 23, 2009